Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
Nos. 78-436, 78-435, 78-432

UNITED STATES OF AMERICA
and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
KAISER ALUMINUM & CHEMICAL CORPORATION,
& UNITED STEEL WORKERS OF AMERICA,

Petitioners,

v.

BRIAN F. WEBER,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

NATHANIEL R. JONES
General Counsel

WILLIAM D. WELLS
MICHAEL W. WARREN
Assistant Counsel

National Association for the
Advancement of Colored People
1790 Broadway—10th Fl.
New York, New York 10019

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BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

Interest of the *Amicus*

The National Association for the Advancement of Colored People (NAACP) is the oldest, largest civil rights organization in the nation, with over 500,000 members in its 1,800 branches across the country. Since the early 1940's, when the NAACP with A. Philip Randolph threatened a march on Washington prompting President Roosevelt to issue the first Executive Order banning racial discrimination by government contractors, to the present day, the amicus has brought all of its resources to bear upon eliminating racial discrimination in employment. The

NAACP has conferred and cooperated with the Executive branch, proposed and supported the very legislation which is threatened with judicial nullification by an affirmance here, and litigated unrelentingly to enforce this country's equal opportunity laws. Slowly over the past decade, the NAACP has found that employers and labor unions have willingly begun to voluntarily abandon their discriminatory practices. They have, on rare occasion, been persuaded to begin taking positive steps to recruit, hire and promote minorities without resort to threats of demonstrations, boycotts, litigation, and loss of federal funding. The amicus has long considered itself in the forefront of the private sector encouraging precisely the kind of affirmative action undertaken by Kaiser at its Gramercy plant.

The NAACP now finds, as a result of the decisions below, that the consequences of a quarter-century of promoting equal opportunity laws are being turned inward against minorities in a wholly destructive manner. The majority panel of the court below would find a conflict between Executive Order 11246 and Title VII and, as a result, would strike down compliance with the Order while discouraging voluntary compliance with the statute. Reversal of the courts below would operate as a positive signal to the country that integration of the workforce is still the will of Congress and that social damage done by an affirmance is de minimus.

Consent of the Parties

Pursuant to Rule 42, the written consent of the Petitioners accompanies the filing of this brief. Written consent of the Respondent has been mailed to the Clerk of the Court.

Introduction and Summary of the Argument

The argument of the amicus is based upon a presumption that the Respondent, Brian F. Weber, has sufficiently established a prima facie case of violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as a plaintiff's burden of proof is usually measured under the statute.[1] The burden of going forward would then shift to Kaiser and the Steelworkers to justify the racial preferences embodied in their entry requirements to craft training positions. This justification must be one which fosters a lawful purpose, it must be necessary to achieve its purpose, there must be no reasonable alternative available which would avoid the use of a racial preference, and Congress must have intended that such a purpose be protected under the statute.

At the trial below, Kaiser established that its adoption of the selection ratio, based upon race, for entry into its craft training programs was done in order to insure that, in time, the racial composition of its craft jobs would approximate that of the labor market from which it hired its employees. The company was motivated to adopt this procedure in response to pressure from the Office of Federal Contract Compliance to integrate its skilled jobs as much as the well founded apprehension of Title VII litigation initiated by its black employees or applicants. In this sense, Kaiser's affirmative action was "voluntary."

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[1] Amicus is aware that other amici are arguing that Kaiser's attempted compliance with Executive Order 11246 results in Weber having failed to establish even a prima facie violation of Title VII. While generally agreeing with this proposition, the argument of the amicus demonstrates that, even if Weber is considered to have shifted a burden of establishing an affirmative defense upon the company at trial, the company has met its burden of defending the use of a limited racial preference.

The company demonstrated at trial that it had tried a variety of measures toward integrating its craft jobs prior to the negotiation of the 1974 agreement with the union, but that none of these measures had been successful. It concluded that only a limited racial preference, coupled with the affirmative hiring program it had begun in 1969, would produce the desired results.

The legislative history of Title VII, its 1972 amendments, the Executive Order program for government contractors, and the recent blending of the statute with the Executive program approved by Congress clearly reflect Congressional intent that the kinds of steps taken by Kaiser in this case are lawful under Title VII.

ARGUMENT

Kaiser's Craft Training Selection Criteria, Providing a Limited Racial Preference, Were Established in Compliance With Title VII of the Civil Rights Act of 1964 and Executive Order 11246 and Constitute a Defense to Respondent Weber's Prima Facie Case.

A. Respondent Established a Prima Facie Violation of Title VII.

Prior to 1974, Brian Weber and all but a few of his co-workers at Kaiser's Gramercy plant had been unable to obtain a skilled craft job with the company. The primary source of craft employees had been the all-white pool of journeymen members in the local construction industry, because virtually none of the company's incumbent employees possessed the skills and experience which the company required to perform the various jobs. Even when the company inaugurated a training program for incumbents in general repair and carpenter/painter trades,

with lowered experience requirements for entry into the program, only a few employees could qualify for the jobs. Tr. 57-59.

In 1974, the collective bargaining agreement and Memorandum of Understanding negotiated by the company and the union created new employment opportunities for Kaiser's incumbent employees. For the first time, they could enter a training program which, if successfully completed, would lead to skilled craft jobs. The training jobs were posted for bid and employees were selected on the basis of their seniority, with selections being made according to a ratio of one black to one white employee.

In April 1974, training positions were posted for bid and employees were selected according to the established ratio. Under this procedure, some members of Weber's class were not selected while black employees with less seniority were selected. In October, a single vacancy in the insulator trainee occupation was posted and apparently, because the last vacancy filled had gone to a white employee under the ratio formula, the job was available to black bidders only. Weber testified that he was therefore barred from bidding on the vacancy. Tr. 32-34.

Title VII generally prohibits the exclusion of any person from employment opportunities on account of their race. 42 U.S.C. §2000e-2. The rights conferred by the statute are individual rights, and they were conferred upon whites as well as minorities. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).[2] Persons challenging practices as violative of Title VII must show that they were treated differently on account of their race,

[2] The *McDonald* decision did not raise the issue of whether affirmative action compliance may constitute a defense under Title VII. *Id.* at U.S. 280 n. 8.

or that the practice complained of had a disparate impact upon them, *Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15 (1977), in order to establish their prima facie case.

Under either of the two theories of analysis articulated in *Teamsters*, Weber may arguably have established a prima facie violation of Title VII. He has shown that, in general, white employees are disproportionately excluded from craft training positions. In December 1974, whites comprised 85.2 percent of the hourly workforce, Tr. 50, yet they were allowed to compete for only 50 percent of the available training positions. Moreover, in October 1974, a position was posted for bidding which was explicitly foreclosed to white employees.

Assuming a prima facie showing, Weber successfully shifted the burden of going forward to Kaiser and the union to prove "some . . . affirmative justification" for the racial preference created by the craft training program entry procedure. *City of Los Angeles, Dept. of Water and Power* v. *Manhart*, 55 L.Ed.2d 657, 667 (1978).

B. Racial Preferences, Used in the Manner and for the Purpose of Those Challenged by Respondent Weber, Have Been Approved by Congress Under Title VII and Constitute an Affirmative Defense Under the Statute.

When Kaiser and the Steelworkers agreed to begin offering training positions for craft jobs according to a racially based ratio in 1974, the record clearly indicates that they were responding to a perceived vulnerability under both Executive Order 11246 and Title VII. Thus, their action was "voluntary" only in the sense that it was not ordered by a court.

Until 1969, Kaiser's Gramercy plant had a minority population of approximately 10 to 11 percent. Tr. 35. Since

that time its accelerated hiring of minorities produced a black hourly workforce of 14.8 percent by December 1974. Tr. 50. Yet, throughout this period the black percentage of the available labor market was 39 percent. Tr. 95-96. Despite the fact that the company had, for reasons which no party to the litigation felt compelled to explore, a workforce composed of substantially less than half of the minority proportion of the local labor market, its minority population of the skilled craft workforce was even smaller. Prior to the 1974 agreement under attack, Kaiser employed only 5 minorities, or 2.5 percent, among its 290 craftsmen. Tr. 98. This was so, the record discloses, because it had traditionally dipped into a virtually all-white pool to fill these positions. J. Ex. A.

In early 1971, the Office of Federal Contract Compliance submitted its evaluation of Kaiser's contract compliance posture to the company.[3] The OFCC identified many serious deficiencies in the plant's compliance with applicable regulations, and it noted specifically that none of its 246 craftsmen were black. A craft training program was suggested by the agency, with a careful evaluation of the potential in its black workforce to be conducted for such a program. The OFCC also stated that any continued direct hiring into craft jobs "should include at least the minority ratio that exists in the company's recruitment area."

A subsequent contract compliance review conducted by the U.S. Atomic Energy Commission in 1973 revealed that Kaiser had allowed several white employees who did not possess the stated experience criteria to transfer

[3] The OFCC's findings and recommendations as well as its cover letter dated January 25, 1971, accompanying the findings have been supplied to the Court by the Department of Justice with its Petition for Writ of Certiorari.

into the skilled crafts.[4] As a consequence, Kaiser agreed to allow black employees to transfer into these jobs who had experiential qualifications equal to that of the least experienced white who had been allowed to transfer. In addition, Kaiser agreed to either validate or eliminate the experience requirements for direct hire or transfer into the maintenance crafts. Kaiser's response to the OFCC compliance reviews was to establish its training program with the racial preference to which the Respondent is objecting. The company stated at trial that it had first lowered, then dropped altogether, any experience requirements for entry into the training programs. Tr. 115.

At the trial, Kaiser demonstrated that there were essentially three factors which led it to adopt the craft training program in 1974. The first was pressure from its government contracting agencies. It stated that the government's position on devising a mechanism for placing minorities into craft jobs was "do it or else." Tr. 77. Under questioning by the trial court, Kaiser explained:

> "... a recommendation from them is pretty much telling us that we ought to do that if they are going to approve our affirmative action plan. If they don't approve our plan and we are held in violation of that, then ... in the end, we either then lose as an entire corporation, not just our Gramercy plant, but as an entire corporation, all Government contracts, or contracts with other company that does business with the Government." Tr. 86.

The second factor considered by Kaiser was the threat of Title VII litigation initiated by its own black employees

[4] A copy of the AEC's January 31, 1973 report has been supplied to the Court by the Department of Justice with its Petition for Writ of Certiorari.

and applicants.[5] Tr. 87-88. It stated that, in addition to the OFCC compliance reviews, the Equal Employment Opportunity Commission and two civil rights organizations, including the amicus, had "been into that plant."[6] Tr. 87. At Kaiser's Baton Rouge plant, less than 40 miles from Gramercy, black employees had filed a Title VII suit against the company which was ultimately resolved by a consent decree. *Burrell* v. *Kaiser Aluminum & Chemical Corp.*, CA No. 67-86 (M.D. La., decree filed February 24, 1975). At its nearby Chalmette, Louisiana, plant, black employees had filed EEOC charges in 1966, a Title VII suit in 1967, and had completed an extensive trial involving, *inter alia,* the filling of craft jobs, by early 1974. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), *rehearing denied per curiam,* 583 F.2d 132 (1978).

The third factor prompting the 1974 agreements with the Steelworkers' union was a more typical collective bargaining concern. The union was anxious to keep the filling of skilled craft jobs within its own jurisdiction by having them filled with union incumbents rather than construction trade journeymen hired off the street. Tr. 58, 71. At Kaiser's Baton Rouge plant, these same craft jobs were not under the jurisdiction of the Steelworkers but rather had been organized by the building trades. Tr. 118.

[5] Both the 1971 and 1973 compliance reports which the Department of Justice has lodged with the Court in connection with this case noted that several of Kaiser's black employees had informed compliance agency officials of discriminatory practices at the Gramercy plant.

[6] Kaiser's acknowledgement on the record that the EEOC had been investigating its Gramercy plant indicates that EEOC charges had been filed by black employees or applicants, since the Commission only acts in response to complaints filed pursuant to the statute. 42 U.S.C. §2000e-5(b).

Kaiser established on the trial record, without rebuttal or conflicting evidence from Weber, that there were no alternatives to the racial preference formula which it adopted that would permit the integration of its skilled craft jobs. It showed that the company had advertised craft job opportunities in minority newspapers in Baton Rouge and New Orleans and maintained racially identified application files in order to give consideration to black applicants when vacancies arose. Tr. 56. It had initiated a training program for the jobs of general repairman and carpenter-painter and had lowered the experience requirement but still could not meet its manpower needs for those positions. Tr. 57-59. The company offered uncontradicted testimony that it knew of no other means available to obtain trained black craftsmen.[7] Tr. 60.

The question presently before the Court is therefore whether the actions taken by the company and the union in 1974, principally designed to comply with Government contract obligations and to ward off the likelihood of Title VII litigation initiated by black workers, have been sanctioned by Congress under the statute.

[7] Obviously, some other ratio than one black for one white could have been selected by the company and the union, and a different ratio would produce a faster or slower entry rate for blacks into the training jobs. However, it is the use of any racial preference whatsoever that the Respondent has challenged, not whether some other ratio would be more appropriate. The record also suggests that alternatives exist with respect to the pools of available labor. For example, continued hiring from the available labor market which is 39 percent minority instead of or in combination with hiring from the plant workforce composed of some 15 percent minorities would increase the natural flow of black trainees. But even this kind of modification of the source of employees would require a racial preference to accomplish the integration of craft jobs. The company showed at trial that the post-1969 hiring ratio for production jobs had resulted in a rise in the proportion of black employees at the rate of only one percent per year, and that its turnover rate for craft jobs was even slower. Tr. 93.

In previous cases arising under Title VII, this Court has often given effect to defenses interposed against practices which would otherwise have been violative of the statute. *Teamsters* v. *U.S.*, 431 U.S. 324 (1977) (bona fide seniority system exception); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (bona fide occupational qualification exception); *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977) (timeliness of EEOC charges). In addition, the Court has frequently referred to defenses which do not appear as an explicit statutory exception to the Act, but which were clearly intended by Congress in the legislative history and underlying purposes of the Act. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Franks* v. *Bowman Transportation Co.*, 423 U.S. 824 (1976); *Teamsters* v. *U.S., supra* (business necessity).[8] In *Los Angeles Dept. of Water and Power* v. *Manhart*, 55 L.Ed.2d 657 (1978), a case involving pension contributions explicitly based upon sex, the Court indicated that an exemption under the Equal Pay Act "or some other affirmative justification," intended by Congress in the passage of Title VII, would constitute a defense. In deciding whether to apply or deny a proffered defense in these cases, the Court has always been guided by the intent of Congress as reflected by the language of the legislation itself or by its legislative history.

In this case, voluntary compliance with Executive Order 11246 has been pled as a defense. The history of the

[8] In *Griggs* and *Albemarle Paper*, the Court has also recognized that employment tests, properly validated under applicable EEOC Guidelines, will be upheld despite the existence of a racial impact. The Court has further found that Congress intended to protect employment terms and conditions which adversely affect adherents to particular religions, when modification of those terms and conditions to accommodate employees would place more than a minimal burden upon the employer. *TWA* v. *Hardison*, 423 U.S. 63 (1977).

Government's contract compliance program and the legislative history of Title VII itself clearly reflect Congress' intent that racial preferences, appropriately utilized and conforming to contract compliance requirements, should not be struck down under Title VII.

By the time Title VII was being debated by the 88th Congress, the contract compliance program growing out of a series of Executive Orders had been a part of the Government's effort to integrate the national workforce for over 20 years. Executive Order 8802, 6 Fed. Reg. 3109 (1941), issued by President Roosevelt, was the first attempt to utilize the Government's contract program as a vehicle for both eradicating racial discrimination in private employment and encouraging integration of the national workforce. The policy of the Government articulated in that Order was clearly to effectuate the goal of integration:

> "To encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders." *Ibid.*

Subsequent to this Order, both Presidents Truman and Eisenhower issued Executive Orders mandating nondiscrimination by Government contractors.[9] By the time Con-

[9] Prior to the Truman Order, President Roosevelt issued Executive Order 9346, 8 Fed. Reg. 7183 (1943), establishing a second Fair Employment Practices Committee to promote the full utilization of manpower and eliminate discrimination. President Truman issued Executive Order 10308, 16 Fed. Reg. 12303 (1951), establishing a Committee on Government Contract Compliance whose purpose was to evaluate the effectiveness of the contract compliance program. President Eisenhower issued Executive Order 10479, 18 Fed. Reg. 4899 (1953), establishing the President's Committee on Government Contracts.

gress began debating passage of the 1964 Civil Rights Act, President Kennedy had issued Executive Order 10925, 26 Fed. Reg. 1977 (1961), an Order which for the first time required more than commitments not to discriminate from Government contractors. Contractors were required to commit themselves to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." E.O. 10925, Sec. 301. The Order provided for enforcement mechanisms including debarrment and contract termination, but it contemplated great reliance upon the voluntary compliance of contractors. Enforcement personnel were directed to "seek compliance with the objectives of this order by conference, conciliation, mediation, or persuasion." *Id.* at Sec. 307. Again, before any sanction proceedings were begun, the contracting agency was directed "to secure compliance with the contract provisions of this order by methods of conference, conciliation, mediation, and persuasion. . . ." *Id.* at Sec. 312 (f). Thus, the Executive Orders in effect during the period of Title VII's debate in 1964 required affirmative action going beyond the mere cessation of any past discriminatory practices; and the enforcement of the Order depended heavily on voluntary compliance by Government contractors.[10]

Congress' intent to preserve the Executive Order contract compliance program with its emphasis on affirmative action and voluntary compliance is clear from the legislative history of Title VII both in its genesis and in its 1972

[10] Prior to the effective date of Title VII, the Kennedy Order was extended on two occasions. President Kennedy issued Executive Order 11114, 28 Fed. Reg. 6485 (1963), in order to include the area of construction contracting within the ambit of the compliance program. President Johnson issued Executive Order 11141, 29 Fed. Reg. 2477 (1964), to include nondiscrimination on the basis of age.

amendments. As this Court has noted, Congress rejected an effort to have Title VII be the primary federal remedy for employment discrimination at the time of the Act's inception.[11] 110 Cong. Rec. 13650-52 (1964); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 n. 9 (1974). In addition, Title VII as originally enacted contained two sections designed to blend, to some extent, the overlapping obligations which the statute and the Order placed on employers. Compliance with the record-keeping portions of the Executive Order would exempt employers from similar requirements of Title VII, 42 U.S.C. §2000e-8(d), and the President was instructed to convene meetings of the President's Committee, the Commission on Civil Rights, state and local FEP agencies, civil rights agencies, and members of the business community for the purpose of informing employers and unions of their obligations under Title VII. 42 U.S.C. §20000e-15. The Clark-Case interpretative memorandum, introduced for the purpose of explaining the House-approved bill in the Senate, stated that Title VII "has no effect on the responsibilities of the [President's Committee] or on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of . . . Federal contracts." 110 Cong. Rec. 7212-7215 (1964). Thus, not only did Congress fail to perceive any conflict between the obligations imposed upon many employers by the Executive Order and Title VII, but it approved the simultaneous compliance activities of the responsible enforcing agencies and sought to inform employers of these dual obligations. Congress clearly

[11] The rejected amendment, offered by Senator Tower, did not even seek to eliminate the activity of the President's Committee on Equal Employment Opportunity. It merely proposed to protect employers subject to both Title VII and the Executive Order from being subjected to simultaneous investigations by the EEOC and the PCEEO, giving the EEOC primary jurisdiction.

sought to accommodate both the remedial nondiscrimination requirements of the statute with the affirmative action requirements of the Executive Order program.

Between July 2, 1965, the effective date of Title VII, and the beginning of debates on the 1972 amendments, the Executive Order applying to contract compliance was changed twice. Executive Order 11246 was issued on September 24, 1965, 30 Fed. Reg. 12319, and modified in part by Executive Order 11478, issued August 8, 1969, 34 Fed. Reg. 12985. Order No. 11246 required contractors to commit themselves by the terms of their contracts both to a policy of nondiscrimination as well as to taking affirmative action insuring that employees and applicants are not discriminated against. Pursuant to this Order, the Department of Labor promulgated a series of regulations both for construction and non-construction industry Government contractors, generally requiring them to analyze the racial composition of their workforce, identify the degree of underutilization of minorities based upon a careful review of a variety of factors, and establish goals and timetables for correcting the underutilization. Prior to the 1972 amendments to Title VII, the increasingly complex requirements of the Executive Order had successfully withstood attacks in the courts based upon their purported unconstitutionality and conflict with Title VII. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *Southern Illinois Builders Association* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *affirmed*, 471 F.2d 680 (7th Cir. 1972); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (D.C. N.J. 1970). Cf. *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967); *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3rd Cir. 1964). Subsequent to Title VII's 1972

amendments, the courts have continued to uphold the contract compliance program as a valid means of integrating the national workforce. *Associated General Contractors of Massachusetts* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); *EEOC* v. *A.T. & T.,* 556 F.2d 167 (3rd Cir. 1977), *cert. denied,* 98 S.Ct. 3145 (1978); *Rossetti Contracting Co.* v. *Brennan,* 508 F.2d 1039, 1045 n. 18 (7th Cir. 1975); *Northeast Construction Co.* v. *Romney,* 485 F.2d 752, 760 (D.C. Cir. 1973).

In 1972, as part of the debate on proposed amendments to Title VII, Congress again rejected an attempt to eliminate the Executive Order program by making Title VII the exclusive federal remedy for employment discrimination, 118 Cong. Rec. 3371-73, 3962, 3964 (1972), and it further refused to transfer the compliance program to the EEOC. *Id.* at 1387-98. Congress was well aware of the distinctions between the Order and the statute. Sen. Saxbe, speaking against the transfer of the OFCC to the EEOC, stated:

> The Executive order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. Proof of overt discrimination is not required.

Legislative History of the Equal Employment Opportunity Act of 1972, p. 915. Congress also rejected two amendments offered by Sen. Ervin which would have prohibited federal agencies from requiring "discrimination in reverse" by employers, *id.* at 1017, 1074, or which would have banned preferential treatment due to racial or some other

imbalance between a workforce and an available labor force. *Id.* at 1714-1717. It was quite clear from the debates surrounding these unsuccessful amendments that it was the contracts compliance program, as typified by the Philadelphia Plan's litigation in *Contractors Association, supra,* that was protected by Congress.

Two of the amendments which were added to Title VII in 1972 reinforce the status of the contract compliance program in relation to Title VII. A section was added establishing the Equal Employment Opportunity Coordinating Council from various agencies charged with enforcing the federal civil rights in employment program. The Council was given the responsibility for:

> ". . . developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies."

42 U.S.C. §2000e-14. Government contractors, whose affirmative action plans had been accepted by a Government agency and who had not deviated substantially from the plan, were accorded a right of "full hearing and adjudication" before the denial, withholding, termination or suspension of the contract could take place. 42 U.S.C. §2000e-17. Thus, Congress in 1972 accorded important statutory rights upon Government contractors operating under affirmative action plans and, in addition, attempted to create a mechanism for harmonizing the obligations which the OFCC and EEOC placed upon contractor/employers.

If Kaiser had done nothing in 1974 but maintain its past practices of filling craft positions with white workers from the local construction trades, the company would undoubtedly have subjected itself to sanctions from the OFCC and of litigation by black workers or the EEOC itself under Title VII.[12] Congress was well aware of the duality of obligations placed upon employers such as those facing Kaiser prior to 1974; and Congress clearly intended for employers to comply with both. In rejecting both of the Ervin amendments to Title VII in 1972, Congress gave its clearest indication that an employer's use of racial preferences, if initiated pursuant to its affirmative action obligations under the Executive Order and carefully tailored to fit its particular needs in complying with the Order, would not violate Title VII. It was never intended that actual compliance with either the statute or the Order would create a violation of the other—and both the statute and the Order heavily encouraged voluntary compliance.

To the extent that there is a latent tension between the remedial use of racial preferences under Title VII and the affirmative use of such preferences contemplated by the Executive Order, both Congress and the Executive have recently undertaken to minimize, if not completely eliminate, that tension. Under President Carter's Reorganization Plan No. 1, 43 Fed. Reg. 19807 (1978), the Equal Employment Opportunity Coordinating Council has been abolished and all of its functions have been transferred to the EEOC. In addition, the EEOC itself has issued Guidelines relating to affirmative action under Title VII.[13]

[12] At the very least, Kaiser's past practices would have established a prima facie violation of Title VII *vis a vis* its black applicants and employees. The statistical imbalance, when coupled with racially exclusionary experiential criteria, would have placed the considerable burden upon the company of justifying the criteria under the doctrine of business necessity. *Teamsters* v. *United States, supra; Hazelwood School District* v. *U.S.*, 433 U.S. 299 (1977). In *Parson* v. *Kaiser Aluminum, supra,* the company was unable to successfully establish such a defense.

The decision of Mr. Justice Powell in last Term's decision in the case of *University of California Regents* v. *Bakke,* —— U.S. ——, 57 L.Ed. 2d 750, 778-9 (1978), strongly indicates that the decision in the instant case should be reversed. Two of the preconditions for utilizing racial preferences discussed in the opinion have been met here. First, there has been a determination by the administrative body charged with enforcing the Executive Order that Kaiser must utilize such a device in order to comply with the Order. This determination was made after at least two careful, on-site compliance reviews of the plant. Second, Kaiser's own perception of its vulnerability to a suit brought by blacks under Title VII, coupled with the known "various indicia of previous constitutional or statutory violations," *id.* at 779, n. 41, would have undoubtedly prompted the company to seek judicial approval of its 1974 program through the vehicle of a consent decree, had it been sued in court. Even the majority panel below acknowledged that Kaiser could have voluntarily

[13] The EEOC's Affirmative Action Guidelines were published on January 19, 1979. 44 Fed. Reg. 4422. They encourage employers to conduct a self-analysis and to determine whether there is a likelihood that they may not be in full compliance with Title VII. If such a likelihood exists, the Guidelines state:

> An employer or other person subject to Title VII who has a reasonable basis for concluding that it might be held in violation of Title VII and who takes remedial and/or affirmative action reasonably calculated to avoid that result on the basis of such self-analysis does not thereby violate Title VII with respect to any employee or applicant for employment who is denied an employment opportunity as a result of such action. The lawfulness of such remedial and/or affirmative action program is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer or other person subject to Title VII taking such action has violated Title VII.

undertaken any action that a court could have ordered or approved.

Whether the decision below is affirmed or reversed, the volume of litigation challenging discrimination and "reverse discrimination" will in all likelihood not abate. Indeed, one of Title VII's central themes is to encourage litigation by persons who perceive themselves as victims of discrimination. The statute's primary purpose, however, as it was legislatively tailored to fit and blend with the Executive Order contract compliance program, is to eliminate discrimination in employment, insure that it does not recur, compensate victims of the illegal discrimination, and ultimately foster the existence of a working society where factors such as race or sex are absolutely irrelevant. Affirmance of the decision below will have precisely the opposite effect.

CONCLUSION

WHEREFORE, for the reasons stated above, amicus respectfully urges that the decision below must be reversed.

Respectfully submitted,

NATHANIEL R. JONES
General Counsel

WILLIAM D. WELLS
MICHAEL W. WARREN
Assistant Counsel

National Association for the
Advancement of Colored People
1790 Broadway—10th Fl.
New York, New York 10019

Certificate of Service

Michael W. Warren, Esq., one of the attorneys for the Amicus certifies that on the 25th day of January, 1979, I did serve three copies each of the foregoing Amicus Brief upon each of the attorneys for the Petitioners and Respondent listed below by mailing the same, postage prepaid, first class, as follows:

Attorneys for the Petitioners:

Lawrence G. Wallace, Esq.
U.S. Department of Justice
Office of Solicitor General
10th & Pennsylvania Avenue, N.W.
Room 5609
Washington, D. C. 20530

Michael Gottesman, Esq.
1000 Conn. Ave., N.W.
Suite 1300
Washington, D. C. 20036

Paul Mirrengoff, Esq.
Equal Employment Opportunity Commission
Office of the General Counsel
Appellate Division Rm. 2293
2401 E. Street, N.W.
Washington, D. C. 20506

Attorney for Respondent:

Michael Fontham, Esq.
1000 Whitney Bank Building
228 St. Charles Ave.
New Orleans, Louisiana 70130

Respectfully submitted,

MICHAEL W. WARREN, ESQ.
1790 Broadway, 10th fl.
New York, N.Y. 10019
(212) 245-2100
Attorney for Amicus
N.A.A.C.P.

By: .....